

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: September 30, 1997

Case No. **95 INA 551**

In the Matter of:

ANTONI OKSINSKI,
Employer

on behalf of

DANUTA OTYLIA GOLAB,
Alien

Appearance: P. W. Janaszek of New York, New York, agent.

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Antoni Oksinski (Alien) by Danuta O. Golab (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under §212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of

¹This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and written arguments. 20 CFR § 656.27 (c).

United States workers similarly employed.

STATEMENT OF THE CASE

On July 19, 1994, the Employer filed an Application for Alien Employment Certification (ETA 750A) to permit its permanent employment of the Alien permanently as a "Cook, Polish Specialty, Live out" with a work schedule of 9:00 a.m. to 6:00 p.m. for a total of 40 hours per week and with a rate of pay of \$12.81 per hour. The job to be performed involved the following:

Prepares seasons, and cooks soups, meats vegetables etc. according to the principles of Polish cuisine. Bakes, broils, and steams meat and fish and other food. Prepares Polish specialty meals such [as] pierogis, borscht, cold beet soup, stuffed cabbage, blintzes, beef sirloin Tartar style. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Accounts for the expenses incurred in purchasing foodstuffs. Decorates dishes according to nature of celebration.

In an attachment to the ETA 750A, the Employer said,

Please be advised that I have an opening for the position of Cook Polish Live-Out in my household. I am eighty three year old and I have a heart condition. I need well balanced meals served four times a day: breakfast in the morning, lunch at 12:30 p.m., dinner at 4:00 p.m. and supper at 6:00 p.m. I am a US veteran and I have been treated for a heart condition few times. I cannot prepare meals for myself or purchase foodstuffs. At the present time my son is staying with me and he purchases the foodstuffs and prepares meals. Unfortunately, my son's wife is in Poland and he will have to return. I am in need of Cook domestic Live-Out and I am in the position to pay her the prevailing wage.

The meals prepared for me have to have low fat, low sodium and low cholesterol contents. The diet is recommended by a doctor and it has to be followed every day because it may affect my health condition.

At the present time I do not employ any U.S. workers in my household. The house chores are performed by my son and occasional outside help paid on an hourly rate.

The position was later classified by the New York Department of Labor, Alien Employment Certification Office (NYDOL) under the Dictionary of Occupational Titles (DOT) as a "Cook (Household)"

under DOT Code No. 305.281-010.² After the Employer's recruitment effort the application was referred by NYDOL to the CO.

Notice of Findings. On April 25, 1995, the CO's Notice of Findings (NOF) proposed to deny the application on the grounds that the regulations require that an employer's job opportunity must be for a full time position, explaining that it did not appear feasible that the duties in the instant case constitutes such employment in the context of the Employer's one person household. The Employer was told that he could rebut this finding by presenting evidence that includes a representative one week schedule accounting for eight hours a day and forty hours per week; a list of duties other than cooking that the worker will be required to perform; copies of tax and/or social security report forms documenting employment of full-time cooks in the past; evidence that his son spent 40 hours per week in performing the necessary cooking duties; evidence of the employment of "occasional outside help" to perform household tasks in the past; and the identity of the person who will perform such duties upon his son's departure for Poland. The Employer was instructed also to explain why in view of the fact that he was not currently employing the Alien and his son's departure for Poland he is willing to wait for the Alien to start working as opposed to hiring a more immediately available U.S. worker.

Rebuttal. The Employer's rebuttal to the NOF contended that cooking had been his hobby and that, based on his personal experience, "to prepare homemade meals takes enormous amounts of time, no matter if you prepare the meal for one or three persons." He added that the trimming of fat from meats and the skinning of poultry were required by his diet and added to the time consumed in performing this job. He explained that his son had been performing the cooking duties on full time for eight hours per day, adding that he cannot demand that his son do this permanently. He then said that his son changed his original intention to leave for Poland and that both he and his wife will stay with him and will perform the other household chores and maintenance.

The Employer's rebuttal included a proposed schedule that was offered to account for a forty hour work week during which

²DOT No. 305.281-010 Cook (Domestic ser.)Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

the cook will prepare for himself, his son and his daughter-in-law fifteen breakfasts, fifteen lunches, fifteen dinners, thirty-five snacks and sandwiches; one "pot dish" for Saturday, three breads and two pastries. Appended to the rebuttal was a statement from the Employer's son that he had been cooking eight hours per day for his father since May 1994, but that he could not continue to do so as he was returning to work. The rebuttal also included a doctor's statement concerning the Employer's cardiovascular disorders; and documents also referred to the Employer's wartime service in the Polish Navy.

Final Determination. The CO issued a Final Determination in which the application for certification was denied on grounds that the Employer's rebuttal does not demonstrate the existence of a full time job opportunity. The CO explained that Employer's rebuttal conflicted with his earlier statement as to the assistance his son rendered, saying that in addition to cooking, the son was performing household duties thus indicating that he was not only cooking, preparing and serving meals eight hours per day but that he also was performing the duties of a Houseworker, General with cooking duties.

Appeal. The Employer requested a review of the denial of his application and the record has been forwarded to the Board for such purpose.

DISCUSSION

According to 20 CFR § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. The Board has held that an employer's burden of proof includes demonstrating that the position is permanent and full time. If the employer's own evidence does not show that the position is permanent and full time, certification may be denied. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). In addition, if a CO reasonably requests specific information to aid in the determination of whether or not the position is permanent and full time, the employer must provide it. **Collectors International, Ltd.**, 89 INA 133 (Dec. 14, 1989).

(1) First, we agree with the CO's finding that Employer's rebuttal does not demonstrate the existence of a full time job opportunity. The reason, as the CO explained, is that the rebuttal evidence conflicted with Employer's description of the assistance his son rendered. It was inconsistent with the existence of a full time job that, in addition to cooking the meals that the position requirements described, the Employer's son was performing the non-cooking chores of the household. From this evidence it was inferred that the son not only cooked, prepared and served the meals, but also performed the duties of a Houseworker, General, together with his cooking duties.

Assuming that the rebuttal description of the cooking duties was correct, it is reasoned that either the cooking duties did not require a full day's work, or the day's work required far more than the eight hours asserted by the application. In either event, the CO's finding that a full time job was not proven must be affirmed on the basis of Employer's representations.

(2) An underlying issue is whether the CO's request for specific information as to Employer's job opening was reasonable. The Board has held that it is not unreasonable for a CO to require adequate proof that positions for household cooks are strictly confined to cooking on a full time basis. **Jane B. Horn**, 94 INA 006 (Nov. 30, 1994); **Marianne Tamulevich**, 94 INA 054; **Mr. & Mrs. Clifford Cummings**, 94 INA 008; **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995). The CO's requests for specific information were reasonable when considered in the context of the issues as to the exact nature of the position that the Employer has offered.

This is germane because the DOT description of a Cook, Household, clearly identifies the position as involving only duties that are performed in the kitchen and at the food market. The DOT specifies that position requires a Specific Vocational Preparation (SVP) time of two years. On the other hand, a job involving such general household duties as cleaning, laundry, and answering the telephone in addition to some cooking is classified as a Household Worker, General, under the DOT, with an SVP of three months. The jobs in the second category are considered by DOT to be unskilled and entitled to a lower visa status than skilled positions under the Act.³ Because it is important to the applicant for alien labor certification that the position be classified as skilled rather than unskilled, the CO is required to inspect the job description closely in determining whether or not it does, in fact, require work that is skilled within the meaning of the Act and regulations.⁴

This dichotomy is significant in the instant case, where the record raises a question as to how the household chores other than the cooking are performed for the Employer. The CO consi-

³As the Immigration and Naturalization Service rules provide that a position requiring two years of training or experience is considered to be a "skilled" occupation that entitles the alien to preferential visa status, this places on the CO the obligation to investigate to determine whether the job is, in fact, a skilled position in the context of this definition.

⁴We agree with the CO that the Employer's statements in regard to how the household chores other than cooking were to be accomplished are conflicting. The Employer's suggestion that his son no longer will be available also is not credible because of conflicting evidence in the Employer's rebuttal. In his initial statement the Employer represented that such tasks were performed both by his son and by outside employees, but he failed to document the employment of any household workers in the past.

dered the record in relation to this issue and found that, in addition to cooking the Employer's son was also performing household duties. This fact was proven by evidence that he not only was cooking, preparing and serving meals eight hours per day, but that he was also performing other duties of a House-worker, General, with cooking duties rather than the work of a Cook, Household. Based on a review of the entire record, we find that the CO's resolution of this issue of fact was well supported by the evidence.

(3) While the CO is required to consider written statements provided in lieu of other documentation and must give them the weight they deserve, the CO is required to evaluate such statements independently and to exercise careful judgement as to the weight they merit in deciding whether or not to grant certification. **Gencorp**, 87 INA 659 (Jan. 13, 1988). Contrary to the Employer's contention, the Final Determination clearly indicates that the CO did consider the Employer's rebuttal evidence, which was rejected as unpersuasive for the reasons discussed above.

Summary.⁵ The Employer said in rebuttal that his estimates of the time required to prepare various meals were based on his experience in cooking for himself in his own kitchen. In weighing those estimates it was observed that the Employer is at best an "amateur" cook. This has been weighed with the assumption that the professional cook he seeks to hire will have the skills to accomplish those kitchen tasks in less time than the Claimant, whose cooking is no more than a hobby, even though he cooked for himself as a necessity. Moreover, the duties that the Employer's son performed together with the cooking strongly indicate that the Employer was seeking a replacement for a member of his family who was engaged in the work of a House-worker, General, with cooking duties, rather than the work of a Cook, Household, under the position descriptions set out in the DOT.

Based on these reasons we agree with the CO that Employer failed to document that the position offered was for a Cook, Household, because he did not document duties that reasonably could be described as full time.

⁵Although the CO's failure to consider this further issue constrains the panel from considering it in resolving this case, we take note that the Employer's job description contained a requirement of two years of Polish style cooking experience that on its face appears unduly restrictive. The practical effect of the Employer's special requirement was to eliminate any U. S. applicant with two years of cooking experience, who has no experience in Polish cooking. The CO should have considered whether the Employer's requirement of two years of experience in Polish style cooking is unduly restrictive, and should have required Employer to show business necessity under 20 CFR § 656.21(b)(2)(i)(B), under which the job opportunity's experience requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, as described in the DOT.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of certification is Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO. 95-INA-551

ANTONI OKSINSKI, Employer
DANUTA OTYLIA GOLAB, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Memo to the Panel:

Pursuant to your notes, I revised the opinion and added your comments. I do not feel that we could decide this case on the "business necessity" issue, however, because the CO failed to raise it in the NOF and we all agree that the CO can be affirmed on the record as it stands. On the other hand, your remarks were made into a lengthy footnote to bring this omission to the attention of the CO. This version is sent for reconsideration as rewritten, in view of the extensive changes required. Because the draft has been pending since June, please expedite.

Thank you,

Judge Neusner

September 5, 1997